

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEW JERSEY

3 \_\_\_\_\_  
4 BARBARA HOUSTON,  
5 PLAINTIFF

6 Vs. CIVIL NO.  
7 08-5530 (PGS)

8 WHITNEY HOUSTON,  
9 DEFENDANT  
10 \_\_\_\_\_

11  
12 **OCTOBER 20, 2010**  
13 CLARKSON S. FISHER COURTHOUSE  
14 402 EAST STATE STREET  
15 TRENTON, NEW JERSEY 08608

16  
17 B E F O R E: THE HONORABLE PETER G. SHERIDAN  
18 U.S. DISTRICT COURT JUDGE  
19 DISTRICT OF NEW JERSEY

20  
21 A P P E A R A N C E S: (BY TELEPHONE)

22 GARCIA & KRICKO  
23 BY: GILBERTO M. GARCIA, ESQUIRE  
24 FOR THE PLAINTIFF

25 NORRIS, McLAUGHLIN & MARCUS  
BY: BRYAN BLANEY, ESQUIRE  
FOR THE DEFENDANT

20  
21  
22 **COURT'S OPINION DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

23 Certified as true and correct as required  
24 by Title 28, U.S.C. Section 753  
25 /S/ Francis J. Gable  
FRANCIS J. GABLE, C.S.R., R.M.R.  
OFFICIAL U.S. REPORTER  
(856) 889-4761

1 THE COURT: Hello, this is Judge Sheridan.

2 MR. BLANEY: Hi, Judge. If I've done this correctly  
3 and I hope I have, I have Mr. Garcia on conference as well.

4 MR. GARCIA: Good afternoon, Judge.

5 THE COURT: All right. How was your flight, Mr.  
6 Garcia, all right?

7 MR. GARCIA: It was great. It was great, thank you.

8 THE COURT: Okay. This is Houston versus Houston.  
9 I think it would be best, Mr. Blaney, if you wish to put  
10 appearances on the record, that would be good.

11 MR. BLANEY: That's fine.

12 MR. GARCIA: I'm Gil Garcia, Judge, appearing on  
13 behalf of the plaintiff.

14 MR. BLANEY: And Brian Blaney, of the law firm  
15 Norris, McLaughlin and Marcus, together with Dan Acesto (ph)  
16 on behalf of defendant Whitney Houston.

17 THE COURT: All right, thank you. So if you can't  
18 hear me, just interrupt and tell me I have to talk louder.  
19 And I'll do that.

20 This matter is before the Court on a motion for  
21 summary judgment by Defendant Whitney Houston, who I'll call  
22 Whitney throughout. The Court has diversity jurisdiction over  
23 the matter, 28 U.S.C. 1332(a)(1). It's a family quarrel over  
24 a residence located in Bergen County which I'll call the  
25 residence; and payment of life insurance proceeds to satisfy a

1 debt owed under a note and mortgage.

2           The owner of the residence was John R. Houston, and  
3 I will refer to him as either John or decedent; who died in  
4 February 2003. Prior to his death, John was an executive of  
5 Nippy, Inc., and John's business relationship with Nippy ended  
6 in 1997.

7           Nippy, Inc. is a corporation wholly owned by Whitney  
8 and it manages Whitney's business affairs. The plaintiff is  
9 Barbara Houston; Barbara, who is a widow of John. Upon his  
10 death John bequeathed all of his assets to Barbara. The  
11 Defendant is Whitney. She's a famous vocalist who is the  
12 daughter of John. Although Barbara and Whitney may be  
13 considered stepmother and daughter, that relationship never  
14 really jelled.

15           On August 23, 1990, Whitney loaned John \$723,800 for  
16 the purchase and renovation of the residence. The loan was  
17 secured by a mortgage on the residence. The mortgage was  
18 prepared by an attorney, James P. Cinque. In that mortgage,  
19 the decedent promised to pay Whitney \$723,800 in monthly  
20 payments of \$3,000; plus interest of accrued interest on  
21 December 31st of each year. The payments were to end on July  
22 31st, 2005. The mortgage binds the decedent and "all who  
23 succeed in his responsibilities (such as heirs and  
24 executors)."

25           Within the mortgage John details the events of

1 default, and the events of default are as follows: "The  
2 lender may declare that I am in default on the note and  
3 mortgage, if, A, I fail to make any payments required by the  
4 note and this mortgage within 10 days of the due date; B, I  
5 fail to keep any other promise I make in this mortgage; C, if  
6 the ownership of the property is changed for any reason; D,  
7 the holder of any lien on the property starts foreclosure  
8 proceedings; or E, bankruptcy, insolvency or receivership  
9 proceedings are started by or against any of the borrowers."

10 In addition, there's one other section added to the  
11 mortgage form, which provides for acceleration of the amount  
12 due upon the transfer of the premises. And it's a quote:

13 "Lender -- that would be Whitney -- may require immediate  
14 payment in full of all sums secured hereunder, if all or any  
15 part of the property or of any right in the property is sold  
16 or transferred without lender's prior written permission."

17 The mortgage also enumerates what remedies are  
18 available to Whitney if default occurs. The mortgage states,  
19 and I quote, "Lender's rights upon default; if the lender  
20 declares that the note and this mortgage are in default, the  
21 lender will have all rights given by law or set forth in this  
22 mortgage. This includes the right to do any one or more of  
23 the following; A, take possession and manage the property,  
24 including the collection of rents and profits; B, have a court  
25 appoint a receiver to accept rent for the property" -- and I

1 have a note here that it added at the end in parentheses: (I  
2 consent to this).

3 But it was hard to read that on the copy of the  
4 mortgage. So, I'll leave that to the parties to look at.

5 "C, start a court action known as foreclosure which  
6 will result in the sale of the property to reduce my  
7 obligation under the note and this mortgage; and D, sue me for  
8 any money that I owe the lender."

9 As the note and mortgage were being negotiated,  
10 there was a notion, for lack of a better term, that the  
11 payment of the note and the mortgage should be insured in the  
12 case of a death of John.

13 Dating as far back as June 27, 1990, an accountant,  
14 Robert \*Rider of the firm of Widenbaum, Rider and Company,  
15 confirmed to Mr. List, the controller of Nippy, that pursuant  
16 to their discussion, a life insurance policy covering John's  
17 life naming Whitney as the beneficiary, would be obtained to  
18 pay for the mortgage in the event John died.

19 In the letter Rider wrote to Mr. List: "By copy of  
20 this letter to Jim Cinque, I am recommending that he prepare a  
21 note and mortgage from John R. Houston in favor of Whitney E.  
22 Houston, in the amount of \$723,800, covering Unit 11-E. As  
23 discussed with you on this telephone, the life insurance  
24 should be finalized within the next 30 days. It appears that  
25 we will be able to get a \$750,000 policy covering John's life

1 naming Whitney as beneficiary. The proceeds of which will be  
2 used to pay off the mortgage."

3 On January 17th, 1991, a life insurance policy on  
4 John's life was acquired by Nippy, Inc. The life insurance  
5 policy was entered with Manhattan Life Insurance, and was  
6 issued for one million dollars naming Nippy as the owner, John  
7 as the insured, and designated Whitney as the beneficiary.  
8 The yearly premiums were \$87,179.

9 Mr. Rider indicated at depositions that the policy  
10 was procured in order to, "protect Whitney and that she  
11 receive her money that she advanced him" (referring to John).

12 On or about January 21st, 1991, Mr. Rider writes to  
13 Jim Cinque, and advises him that the life insurance policy has  
14 been obtained, and suggests that an agreement should be  
15 prepared between John and Whitney, wherein Whitney would apply  
16 the proceeds of the policy against any mortgage or unpaid  
17 interest that is due at the time of death, and the balance, if  
18 any, would pass on to John's estate.

19 The letter reads in part; "The life insurance has  
20 finally been obtained on the life of John R. Houston in the  
21 amount one million dollars, Whitney Houston is named as  
22 primary beneficiary. The owner of the policy is Nippy, Inc.  
23 The insurance is with Manhattan Life Insurance Company under  
24 policy...", and it gives a policy number. "An agreement  
25 should now be prepared between John R. Houston and Whitney E.

1 Houston in which Whitney receives the proceeds of the policy  
2 to the extent of any mortgage or unpaid interest due by John.  
3 The balance of the insurance proceeds would pass under John's  
4 will. I have reminded John that he should have a will  
5 prepared, so the balance of life insurance can pass the way  
6 John wants, as well as his real property. In order to have  
7 John focus on this, perhaps you or Sheldon should prepare a  
8 draft of a basic will for discussion with John. I believe  
9 between Jerry List and myself we have a handle on the total  
10 assets of John's estate."

11 On or about February 14th, 1991, Mr. Rider writes to  
12 John requesting that John execute a form supplied by Manhattan  
13 Life where Whitney was made irrevocable beneficiary on the  
14 policy. The letter states in part: "Jim Cinque is in the  
15 process of preparing an agreement between you and Whitney  
16 regarding the proceeds of the life insurance policy to the  
17 extent that there is a mortgage outstanding to Whitney. In  
18 this connection it is suggested that no one can change the  
19 beneficiary without the consent or approval of Whitney."

20 Thereafter, John signed the form making Whitney  
21 irrevocable beneficiary of the life insurance policy. This  
22 document insured that no one except Whitney can change the  
23 beneficiary designation in the policy. And it reads in part,  
24 and it's a quote: "I hereby request that the beneficiary  
25 under my policy number be changed in accordance with the

1 change of beneficiary clause, care of to Whitney E. Houston;  
2 with no right of revocation approved and consented to by  
3 Whitney E. Houston, I hereby certify that the policy is not  
4 now assigned, and that no insolvency or bankruptcy proceedings  
5 are pending against me. The Manhattan Life Insurance Company  
6 is hereby requested and directed to make the foregoing  
7 revisions as part of said policy; copy here of duly signed by  
8 an authorized official of the company, and attached to the  
9 policy will constitute an endorsement of the policy."

10 On March 11th, 1991, Mr. Cinque sent the letter to  
11 Mr. Rider forwarding a draft of an agreement between Whitney  
12 and John, designating that the policy proceeds pay off the  
13 note and mortgage, and the remainder went to John's estate.

14 It's undisputed, of course, that there is no  
15 evidence that this draft agreement as drafted by Mr. Cinque  
16 was signed by either Whitney or John. I should also state  
17 that it's unclear from the record who Mr. Cinque represents in  
18 the matter; i.e., he could represent Whitney, John, Nippy or  
19 all three. It wasn't clear to me. I do know that at  
20 depositions Whitney indicated that she didn't even know Mr.  
21 Cinque, so it's just difficult to understand his  
22 representation.

23 At depositions Mr. Cinque and Mr. Platt had little  
24 or no recollection of the draft agreement that I just spoke  
25 about or whether any negotiations occurred relating to the



1 draft agreement. But Mr. Rider surmised that the requested  
2 designation of an irrevocable beneficiary in the life  
3 insurance policy, "would have been done for Whitney's  
4 protection because she did not own the policy."

5 A month later after this draft agreement was  
6 forwarded by Mr. Cinque, John retained Gene Korf, of Hannock  
7 Wiseman, a firm that doesn't exist anymore, for estate  
8 planning purposes. As part of the estate, Mr. Korf urged an  
9 agreement between John and Whitney on the insurance proceeds,  
10 in order to ensure an agreement is made.

11 On April 11th, 1991, Mr. Korf wrote to John, and I  
12 quote: "I've determined that there's a one million dollar  
13 policy on your life, and that you have irrevocably designated  
14 Whitney as the beneficiary of the policy. Nippy is the owner  
15 of the policy. You've told me that it is your intention for  
16 the \$750,000 to be paid to your daughter to satisfy the  
17 mortgage on your home, and that the rest of the insurance be  
18 paid to Peggy." Peggy is a nickname for Barbara, his wife.

19 "As of now there is no formal agreement to do this.  
20 Although I have seen a draft agreement designed to accomplish  
21 this, you should follow up with Sheldon Platt's office to make  
22 sure this agreement is implemented."

23 That was the advice of Mr. Korf.

24 10 months later on February 26th, 1992, Mr. Korf  
25 sent another letter to Mr. List, controller of Nippy, advising

1 him that he had prepared "documents to implement the  
2 agreed-upon arrangement with respect to the disposition of the  
3 above-referenced insurance proceeds in satisfaction of the  
4 \$723,000 loan from Whitney to John."

5           On March 3rd, 1992, Mr. Rider sent a letter to  
6 Jerome List. In that letter Mr. Rider was irked at Korf who  
7 had "gotten totally carried away with the matter". But he  
8 suggested that the "Cinque draft", be signed by the parties.  
9 On May 5th, 1993 Mr. Cinque faxed a copy of the draft  
10 agreement to Jerome List. During '93 and throughout the rest  
11 of the policy, the premiums continued to be paid by Nippy, and  
12 Whitney continued to be an irrevocable beneficiary, but no  
13 agreement was ever signed by John and Whitney.

14           John made his last will and testimony in November  
15 1998. By that time, John was not paying the mortgage, and  
16 thus he knew he was in default, and of course the dedication  
17 of the insurance proceeds to be paid against the mortgage must  
18 have arisen as an important issue at the time. Curiously  
19 enough, nothing occurred. That last will and testimony was  
20 not written by Mr. Korf, but I think it was written by an  
21 attorney for the Bressler law firm.

22           In January, 1999, there is a letter from Theodore  
23 Beyer, an accountant with Mintz Rosenfeld, to an attorney Fred  
24 Gaines in California. It indicates the proceeds were to pay  
25 off the mortgage. The letter states: "Per Ira's request --"

1 and I'm not sure who Ira is; "-- enclosed please find a  
2 complete copy of our file on John Houston's one million dollar  
3 life insurance policy naming Whitney as beneficiary. The  
4 purpose of this life insurance policy is to secure repayment  
5 of Whitney's mortgage to John in the event of John's death.  
6 As you will see, the premiums for this policy are quite large.  
7 In fact, over the years the premiums have totaled almost as  
8 much as the face value of the policy, and very little cash has  
9 accumulated."

10 On or about March of 2003, a month after John's  
11 death, Laurie Yokosbosky, an accountant with Mintz Rosenfeld  
12 prepared a draft document analyzing the mortgage payments made  
13 by John, and the balance remaining on the mortgage due to the  
14 non-payment of interest.

15 Inexplicably, the \$1,000,000 life insurance policy  
16 was credited against the mortgage debt, but at deposition Ms.  
17 Yokosbosky was queried why she credited the proceeds against  
18 the mortgage, and she answered that those were her  
19 instructions, and she never recalled seeing or hearing  
20 anything about an agreement.

21 When John died in February 2003, Whitney received  
22 the proceeds of one million dollars. John had a last will and  
23 testament, the will was probated, and the executor deeded the  
24 residence to Barbara. At the time of John's death he owed in  
25 excess of a million dollars to Whitney. Notably, Whitney

1 never objected to the transfer of the residence to Barbara by  
2 the executor. And it does not appear that Whitney filed any  
3 type of claim as a creditor in any estate or probate  
4 proceedings.

5           At depositions, Whitney had little knowledge or  
6 recollection about the life insurance. At depositions she was  
7 asked whether any accountant or controller had discussed the  
8 issue of the life insurance policy. Whitney's reply made  
9 little sense to me, but she insisted, "My father had access to  
10 certain monies of mine, okay, so he would have had to make up  
11 these documents and been able to do that without my  
12 knowledge."

13           Despite that answer during depositions, Whitney  
14 clearly maintained that she did not sign any documents about  
15 the proceeds of the life insurance. In fact, Whitney  
16 initially declared that she had never seen the mortgage  
17 related documents until the date of her deposition, but then  
18 on redirect she recalled otherwise.

19           Whitney also testified that she did not know  
20 anything about the actions of the accountants regarding the  
21 life insurance policy. She never saw any of the letters from  
22 the accountants. She never asked the accountants to prepare  
23 any documents related to the life insurance policy proceeds,  
24 being used to pay the mortgage. Whitney indicated that those  
25 actions were without her authority and without her knowledge.

1           Although John stopped making payments on his  
2 mortgage when he retired in 1997, Whitney never sent her  
3 father a default letter or a notice of intent to foreclose.  
4 However, after John passed on, Whitney has demanded that  
5 Barbara pay the mortgage amount.

6           Whitney's only explanation about the life insurance  
7 policy is that it should not be credited toward payment on the  
8 mortgage, on the residence, because she paid the premium and,  
9 "it was taken out to pay for medical and other expenses John  
10 may have needed."

11           Whitney's argument is that Barbara's claim must be  
12 dismissed because there is no writing to support it.  
13 According to Whitney's attorney, the statute of fraud requires  
14 a writing; NJSA 25:1-13(a). But the position of Whitney does  
15 not refer to a later provision which allows parol agreements,  
16 proven by clear and convincing evidence, NJSA 25:1-13(b), to  
17 be enforced.

18           The statute reads in pertinent part: An agreement  
19 to transfer an interest in real estate or to hold an interest  
20 in real estate for the benefit of another, shall not be  
21 enforced unless; (1) is a writing; but (B), says in full. A  
22 description of the real estate is sufficient to identify it,  
23 the nature of the interest to be transferred, the existence of  
24 the agreement, and the identity of the transferor and the  
25 transferee are proved by clear and convincing evidence.

1           Barbara's attorney is not so concerned about the  
2   content of the statute of frauds, because he argues the  
3   statute of frauds does not apply. Plaintiff's attorney  
4   broadly concludes that the statute of fraud applies to real  
5   estate transactions, and the controversy here is different.

6           He declares, "The life insurance was created to pay  
7   a balance of the mortgage. It is not intended as a contract  
8   of sale of real estate, or a real estate transaction. The  
9   allegations of Barbara Houston's complaint do not even  
10   resemble a transfer of real estate. There was no contract to  
11   transfer any real estate in this case. There is an allegation  
12   of a promise to apply life insurance proceeds to the balance  
13   of a mortgage, and disavowing of such promise by Whitney  
14   Houston."

15           And he concludes, "If a person seeks a discharge of  
16   a mortgage, such discharge must be in writing, but the statute  
17   refers to the document itself and not the means to obtain such  
18   document. This case is about applying life insurance policy  
19   to reduce a balance on the mortgage. Barbara Houston seeks to  
20   receive credit towards the mortgage. It is admitted she can  
21   no longer obtain a discharge of the mortgage based on the life  
22   insurance proceeds, because the balance on the mortgage  
23   exceeded one million dollars proceeds in 2003 when John  
24   Houston died. However, if she sought a discharge of mortgage,  
25   such discharge would have to be in writing. That is what the

1 statute of frauds says about."

2 Then he continues; "Barbara Houston claims a credit  
3 toward the mortgage from the life insurance proceeds. She is  
4 not asking for forgiveness of the mortgage. This clearly  
5 would have to be a written document."

6 As noted by Plaintiff's attorney, there are certain  
7 writings required to transfer, "an interest in real estate",  
8 NJSA 25:1-11. Pursuant to the statute of frauds, an interest  
9 in real estate means "any right, title or estate in real  
10 estate, and shall include a lease of real estate; a lien, such  
11 as a mortgage on real estate; a profit; an easement; an  
12 interest in trust in real estate; and a share in a cooperative  
13 agreement."

14 Moreover the statute further explains, "A transfer  
15 of an interest in real estate 'means the sale, gift, creation  
16 or extinguishment of an interest in real estate'."

17 A particular note is the term "extinguishment" of  
18 an interest in real estate. And that term is not really well  
19 defined in the statute or in New Jersey case law. In Blacks  
20 Law Dictionary, extinguishment is defined as "the cessation or  
21 cancellation of some interest or right, for example, the  
22 extinguishment of a legacy occurs when the item bequeathed no  
23 longer exists or no longer belongs to the testator's estate."

24 And then Black's defines "extinguishment of lien",  
25 which means a lien's discharge by operation of law.

1           It seems to me the alleged agreement to use the  
2 insurance proceeds to pay off the mortgage is an  
3 extinguishment of Whitney's mortgage. As such, it is subject  
4 to NJSA 25:1-11.

5           Under that provision an extinguishment may occur;  
6 (1), if there is a writing signed by or on behalf of the  
7 transferor; or (2), the transferee is in possession of the  
8 real estate as a result of the transfer and has paid the  
9 consideration. Unless one of these two are satisfied, then  
10 the alleged agreement is subject to the statute of frauds.

11           In this case, number one does not apply because  
12 there is no agreement signed by either Whitney or John about  
13 the agreement; nor does two apply, because Whitney paid for  
14 the policy premium, and John has not paid the consideration  
15 for the premium.

16           So, it seems to me that the logical thing to do is  
17 to follow the statute, which would bring us back to NJSA  
18 25:1-13. As such the Court is directed back to the statute of  
19 frauds in order to evaluate whether there's a binding, as the  
20 Plaintiff calls it, "promise", that is whether there's a  
21 binding promise to satisfy the statute.

22           The Court looks to Subsection B of the statute of  
23 frauds wherein Plaintiff must prove by clear and convincing  
24 evidence the existence of an agreement. That's NJSA  
25 25:1-13(b). See also, *Morton versus Orchard Land*, 180 NJ 182,



1 2004; and *McBarron versus Kipling Woods*, 365 NJ Super 114,  
2 2004.

3 Generally, the clear and convincing standard is a  
4 high burden of proof. The term is defined generally as  
5 evidence indicating that the thing to be proved is highly  
6 probable or reasonably certain. This is a greater burden than  
7 the preponderance of the evidence, the standard applied in  
8 most trials; but less than evidence beyond a reasonable doubt,  
9 the norm in most criminal trials (Black's Law Dictionary).  
10 See also Third circuit Model Civil Jury Instructions, Section  
11 1.11; *Crozen v. Missouri Department of Health*, 497 U.S. 286  
12 n.11 (1990).

13 An agreement must be made between the parties by  
14 which they intend to be bound. When an agreement has not been  
15 reduced to writing, a high standard of proof must be proven.  
16 See *Morton*, 180 N.J. 186 and 187. Above I have referenced to  
17 the *Morton* and *McBarron* cases. In *McBarron*, the appellate  
18 division of the superior court emphasized that most questions  
19 require a jury to determine most disputes; but in *Morton*, six  
20 months later, the Supreme Court determined a "clear and  
21 convincing standard" without a jury. This case is more like  
22 *Morton* and a jury is not necessary.

23 In my view no reasonable jury could find that the  
24 Plaintiff meets its burden by clear and convincing evidence  
25 for the following reasons. First, Whitney denies having made

1 any such agreement; second, Cinque and Rider have no  
2 recollection of such agreement; third, Yokosbosky, the  
3 accountant, never heard of any agreement; fourth, no one has  
4 produced a signed agreement; fifth, a Cinque draft and a Korf  
5 draft were never executed, and John was specifically apprised  
6 of both of those drafts.

7 Sixth, the life insurance policy and the irrevocable  
8 beneficiary endorsements have no mention of real estate within  
9 them or that the note and mortgage must be satisfied.

10 Most importantly, the Korf letter, from which I had  
11 read earlier, indicates that John knew that an agreement was  
12 necessary to apply the proceeds of the policy against the  
13 mortgage indebtedness. And after he received this letter, it  
14 never amounted to any action by John. Mr. Korf said at one  
15 point: "As of now there is no formal arrangement to do this,  
16 although I have seen a draft agreement designed to accomplish  
17 this. You should follow up with Sheldon Platt's office to  
18 make sure this agreement is implemented."

19 So that John had notice of the fact that no  
20 agreement had been signed by or reached with Whitney. Despite  
21 the notice of the issue, the parties did nothing to change it  
22 during John's lifetime, and this was from 1992 to 2003, which  
23 was 11 years. Although we condensed all the facts carefully  
24 above, the ongoings were over a long period of time.

25 Seventh, Plaintiff's counsel argues that the

1 representations of Whitney's representatives are sufficient to  
2 require a jury trial. I do not see it. Cinque, Platt and  
3 others do not recall any representations or even any  
4 negotiations. Hence, there's no agreement that a jury could  
5 find by clear and convincing evidence.

6           Even if Barbara's attorney is correct and the  
7 statute of fraud doesn't apply, then Barbara would be required  
8 to prove that there was some type of contract, and under that  
9 scenario the plaintiff would still have to prove by a  
10 preponderance of the evidence that there was a breach of the  
11 contract, or there was past performance on the contract. And  
12 even under those circumstances based on the facts I had set  
13 forth above, the Plaintiff cannot even show by a preponderance  
14 of the evidence that there was such an agreement.

15           According to Black's Law Dictionary, preponderance  
16 of the evidence is just, as we know it, means the greater  
17 weight of evidence, not necessarily established by the  
18 greatest number of witnesses, but by evidence that has the  
19 most convincing force, superior evidentiary weight; that  
20 though not sufficient to free the mind wholly of reasonable  
21 doubt is still sufficient to incline a fair and impartial mind  
22 to one side. And it's the case of most civil trials. See  
23 Third Circuit Model Civil Jury Instructions, Section 1.10.

24           But here there is no substantive proof whatsoever of  
25 any type of contract or agreement between John and Whitney.

1 There were some allegations or some ideation of the fact of an  
2 agreement put forth by the accountants and by Mr. Cinque, but  
3 generally nothing ever happened with those thoughts. No one  
4 can conclude that any formal writing or oral agreement  
5 happened between Whitney and John. And as such, I find that  
6 no jury could find in favor of the Plaintiff, and I'll dismiss  
7 that claim.

8 Now, Mr. Garcia, you had brought a motion to dismiss  
9 the counterclaim, that is based upon the foreclosure statute.  
10 And Mr. Blaney had indicated that I shouldn't dismiss it  
11 because of the entire controversy doctrine. But, there are  
12 two parts of Plaintiff's argument.

13 One of Plaintiff's arguments was that it must  
14 proceed through a foreclosure action. Although foreclosure is  
15 not asked for in the complaint, Defendant should have  
16 counterclaimed for foreclosure -- or Whitney should have  
17 brought a foreclosure action in state court. And Plaintiff  
18 argued one can't have a federal court action.

19 MR. GARCIA: That's correct, Judge.

20 THE COURT: But if you look at Section 28.5 of  
21 Policies and Practices, under the New Jersey Practice Series  
22 on the Law of Mortgages, it indicates -- and I'll read it to  
23 you; "Under appropriate circumstances with the proper  
24 jurisdictional amount involved and diversity of citizenship of  
25 the parties, a foreclosure action involving land in New Jersey

1 may be brought in the New Jersey District Court for the  
2 District of New Jersey." And then it cites a few rules.

3 That I would find would not foreclose Whitney from  
4 bringing a foreclosure action in the federal court.

5 Then your last point was that the foreclosure act  
6 requires that be undertaken first before any case involving a  
7 deficiency judgment. Isn't that right?

8 MR. GARCIA: That's correct, Judge.

9 THE COURT: So, at the present time I think you're  
10 correct on the theory of the law of mortgages, that under  
11 foreclosure you first must proceed with foreclosure, and then  
12 after foreclosure you may bring an action for the rest of the  
13 amount that is owed --

14 MR. BLANEY: Your Honor, I don't mean to interrupt  
15 you, but that's part of what I mentioned or what I was  
16 referencing by entire controversy doctrine. This action was  
17 initiated by Barbara Houston, not by Whitney Houston, we were  
18 responding to her action, and I referenced all of that in our  
19 response, under the entire controversy doctrine. We didn't  
20 initiate the foreclosure, action was initiated.

21 THE COURT: All right. But in your papers you don't  
22 even ask for foreclosure. You ask for monies that are -- to  
23 dismiss the complaint, and there was a counterclaim for the  
24 monies owed on the mortgage and note.

25 The problem I have with that is the mortgage

1 document seems to give Whitney the authority or the ability to  
2 request foreclosure. If I've read it correctly, it says under  
3 the events of default what Whitney can do, and one of the  
4 events of default would be, "sue me for any money that I owe  
5 the lender". That was what John had agreed upon. So, that  
6 maybe allowed her to do that.

7 The statute isn't clear on it, in this case where  
8 you don't bring the foreclosure suit outright. The issue is  
9 there has been no clear briefing on the answer to Mr. Garcia's  
10 last question. It seems to me, though, that --

11 MR. BLANEY: Your Honor?

12 THE COURT: Yes.

13 MR. BLANEY: I think we might have lost Mr. Garcia.

14 THE COURT: Oh, we lost Mr. Garcia?

15 MR. BLANEY: Your Honor, can I call you right back?

16 THE COURT: All right.

17 (Brief recess.)

18 MR. BLANEY: Hi, Judge?

19 THE COURT: Yes?

20 MR. BLANEY: Brian Blaney. I believe -- I hope I  
21 have Mr. Garcia on again.

22 THE COURT: Are you there, Mr. Garcia?

23 MR. GARCIA: Yes.

24 THE COURT: All right. The last issue was whether  
25 or not Mr. Blaney could proceed on his counterclaim, even

1 though he didn't actually mention foreclosure within it. And  
2 my view is that the counterclaim may not survive because the  
3 complaint is dismissed, and there is no claim for foreclosure.  
4 Moreover, it's not clear enough exactly as to what Whitney  
5 wants.

6 So, at this point I'm dismissing the counterclaim as  
7 well. As Mr. Blaney indicated, he will proceed in state court  
8 XXXX foreclosure, unless someone can give me a good reason why  
9 I should allow it to stay here in federal court.

10 MR. BLANEY: Your Honor, the point that is most  
11 important for us, is that your Honor's concluded that the  
12 mortgage now outstanding in the true measure in terms of the  
13 total amount of principle and interest that is owed, I have to  
14 candidly tell your Honor I assume that I need to go back to  
15 Trenton to foreclose.

16 I don't do real estate work and I wasn't completely  
17 comfortably confident that I could pursue foreclosure in the  
18 federal court, although I had no reason to doubt that it the  
19 Court is competent in appropriately competent jurisdiction.

20 THE COURT: So at any rate, at the present time,  
21 there's no request for foreclosure in this lawsuit that I  
22 have. You didn't ask to amend the complaint to include  
23 foreclosure.

24 MR. BLANEY: Well, what I'm asking your Honor now is  
25 to ask for permission that your Honor, if you choose to

1 dismiss, that it be dismissed without prejudice, subject to it  
2 subsequently being refiled.

3 THE COURT: All right. So the counterclaim is  
4 dismissed without prejudice. So that if Mr. Blaney wishes to  
5 move forward in state court, he can do so.

6 MR. BLANEY: Thank you, your Honor.

7 THE COURT: All right.

8 MR. GARCIA: Thank you, your Honor.

9 THE COURT: Are there any other issues?

10 MR. BLANEY: No, I only need to request -- and I'm  
11 not sure if your reporter is there -- for an expedited copy of  
12 the transcript.

13 THE COURT: All right. Well, Frank will do. It you  
14 just probably need to send him a check or something.

15 MR. BLANEY: That's fine, your Honor. I'll reach  
16 out to him and figure out what amount that I need to send to  
17 him.

18 THE COURT: If you just call our office tomorrow,  
19 you'll be able to talk to Frank.

20 MR. BLANEY: That's fine. That's what I was going  
21 to suggest, your Honor.

22 THE COURT: Thank you.

23 MR. GARCIA: Thank you, Judge.

24 THE COURT: All right, bye.

25 (Matter concluded.)



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